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no longer had any application, except as to accounts stated. It is highly desirable that merchants should know definitely when they must sue on their accounts. If the legislature did intend to affect all merchants' accounts by the amendment, it would perhaps be desirable, in view of the already settled meaning of the term "open book account,"¹¹ to remove further doubt by a rephrasing of the section.

An analysis of the principal case in its effect upon the Statute of Limitations in the various kinds of merchants' accounts gives the following results. If there are only one or two items clearly agreed upon and no payment on account, the statute is two years; even if payments have been made, the view in other states is that this is not an open book account.¹² There is no decision in California, but the period is probably two years. Where there is a series of transactions such as to constitute an open book account generally,¹³ still in California the period of limitation is two years unless payments have been made, in which case it is four years. Where there are one or two items, the terms of which are in dispute, there is an open book account in other states,¹⁴ but in California the statute runs in two years unless there is a balance due extending the period to four years. Why should not the legislature substitute for this variety of rules a simple, uniform, four year limitation for all merchants' accounts, including accounts stated? A suggested difficulty¹⁵ in the latter case is that this will enable a merchant to wait for almost four years, then render a statement to reduce his claim to an account stated and add four years more. But practically, a merchant would not endanger his account by waiting so long merely to add another four year period to the one already given him.

J. G.

STATUTE OF LIMITATIONS: UNDERGROUND TRESPASSES: CONSTRUCTIVE FRAUD.—The statutes of most states simply provide that actions for trespass to realty shall be commenced within a certain time after the commission of the act, while actions in cases of fraud need only be commenced within a certain time after the discovery thereof. In the statutes of but few states is there a provision that actions for underground trespasses and unlawful removal of ore shall be commenced within a certain time after the discovery of the trespass.¹ In the absence of such a statute

¹¹ Supra, notes 4 and 5.

¹² Supra, notes 4 and 5.

¹³ Supra, n. 4.

¹⁴ Supra, n. 5.

¹⁵ *Auzerais v. Naglee* (1887), 74 Cal. 60, 67, 15 Pac. 371. For notes on Account Stated see 2 California Law Review 50, 3 California Law Review 317.

¹ Montana, Rev. Codes (1907), § 6449; New Mexico, Comp. Laws

it is obvious that if the statute of limitations applicable to visible trespasses is applied, in most cases an injured party will be deprived of his remedy before he could know by the exercise even of the greatest amount of care that an injury had been done him—an unfortunate result, yet one which was reached by the Washington court in *Golden Eagle Mining Company v. Imperator-Quilp Mining Company*,² where it was held that the statute applicable to ordinary trespasses applied even where the trespass was intentional. Directly contra to this was the holding of the California court in *Lightner Mining Company v. Lane*,³ where it was held that in the case of an intentional underground trespass the concealment of the act suspended the statute, and that the statute relative to fraud was to be applied.

Undoubtedly the view taken by the California court is a common-sense one, and the justice of the ruling was, of course, noted in the Washington case. The difficulty, however, presented to the court is one which always presents itself in the case of rigid codification, with its consequent mutually exclusive classification. Because it considered the cause of action as arising out of a trespass, the unlawful entry into the land of another, the court in the principal case felt constrained to hold that the statute of limitations applicable to trespasses must control, for "the substantive cause of action was not fraud"—a view sharply contrasted with the view in the Lightner case, where it was held that "the act in its very nature constitutes the deceit which makes it a fraud," and that because of this fraud, irrespective of the character of the action, time will not commence to run until the act was or might have been discovered.

The California view finds considerable support in the authorities,⁴ though the cases involving the precise point are few. It is to be noted, however, that thus far the rule in California has been applied merely to the case of an intentional trespass and an intentional concealment, where indeed, elements of fraud may be found. The graver question arises whether the same rule would be applied in the case of an inadvertent trespass where no active attempt is made at concealment. Many of the elements upon which

(1897), §§ 2916, 2978; Nevada, Rev. Laws, (1912), § 4967; Ohio, Rev. Stats., § 4982; Utah, See *Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co.* (1909), 36 Utah, 329, 103 Pac. 881.

² (Wash., 1916), 161 Pac. 848.

³ (1911), 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913 C, 1093.

⁴ *Lewey v. Frick Coke Co.* (1895), 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684; *Eccles. Commrs. v. N. E. Ry. Co.* (1877), L. R. 4 Ch. Div. 845, overruling *Hunter v. Gibbons* (1856), 1 H. & N. 459, 465, 156 Eng. Rep. R. 1281; *Bulli Coal Min. Co. v. Osborn*, (1899) App. Cas. 351, 362. Contra, but changed by statute as noted supra, n. 1, *Williams v. Pomeroy Coal Co.* (1882), 37 Ohio St. 583. See also (though not a case of underground trespass) *Bailey v. Glover* (1874), 88 U. S. 342, 22 L. Ed. 636.

fraud could be built are here lacking. Though a contrary view prevailed for a time,⁵ it now seems that in England in the case of such an inadvertent trespass time commences to run from the date of the commission of the act.⁶ However, it is apparent that every consideration which induces the application of the rule in the case of an intentional trespass applies to the case of an innocent and inadvertent trespass. No fiction can be indulged in that the owner is constructively in possession of, and therefore held to know what is occurring within his land. It cannot be presumed that the legislature intended to enact a statute which would cut off the injured party's remedy without giving him an opportunity for the redress of the wrong admittedly done. If, indeed, the intentional underground trespass and the intentional concealment thereof be considered an actual fraud, why not term the inadvertent trespass, which also is of such a character as to "conceal itself," a constructive fraud?

M. W.

WILLS: SIGNATURE OF OLOGRAPHIC WILL.—Section 1277 of the California Civil Code demands that an olographic will should be entirely written, dated and *signed* by the hand of the testator himself. The name of the testator need not be subscribed to the testament; if it appears in any part of the will, it may be sufficient to constitute a signature within the terms of this section if upon the face of the instrument it is clear that the name was intended as a signature. As established by *Estate of Manchester*¹ and *Estate of McMahon*,² "the true rule . . . is that wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself."³ Consequently where at the beginning of the will, the testatrix writes, "This is the last will and testament of Elizabeth R. McMahon," and the will concludes with the statement, "I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament," the name appearing in the initial clause of the testament is intended as a signature and the will is valid.⁴ On the other hand, where the concluding clause reads, "Whereunto I hereby set my hand this fourteenth day of January, 1914," and no signature follows, the name appearing in the first clause of the will is clearly not intended as a signature and the will is invalid.⁵

⁵ Eccles. Commrs. v. N. E. Ry. Co., *supra*, n. 4.

⁶ Bulli Coal Min. Co. v. Osborn, *supra*, n. 4

¹ (Feb. 15, 1917), 53 Cal. Dec. 220, 163 Pac. 358.

² (Feb. 16, 1917), 53 Cal. Dec. 225.

³ *Estate of Manchester*, *supra*, n. 1, at p. 223.

⁴ *Estate of McMahon*, *supra*, n. 2.

⁵ *Estate of Manchester*, *supra*, n. 1.